IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

01 COMMUNIQUE LABORATORY, INC.,)	
)	
Plaintiff,)	
)	
vs.)	Civil Action No. 1:10-cv-01007-CMH-TRJ
)	
LOGMEIN, INC.,)	
)	
Defendant.)	
)	

LOGMEIN, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION IN LIMINE #5
TO PRECLUDE TESTIMONY BY 01'S EXPERT REGARDING
LOGMEIN'S SOURCE CODE

I.   INTRODUCTION

Dr. Grimshaw's testimony about infringement should be excluded altogether (*see*

LogMeIn's *Daubert* motion filed herewith), but in any event he should be precluded from

testifying about LogMeIn's source code at trial. His expert reports do not identify any specific

portion of LogMeIn's source code that he supposedly relies upon when analyzing the asserted

claims. His reports also fail to disclose any analysis or explanation of how his claimed review of

LogMeIn's source code has confirmed his opinions. As such, pursuant to Fed. R. Civ. P. 26 and

37, Dr. Grimshaw should be precluded from offering any testimony at trial regarding LogMeIn's

source code.

II.   DR. GRIMSHAW'S EXPERT REPORTS

Dr. Grimshaw has submitted four expert reports in this case pertaining to LogMeIn's

alleged infringement of the '479 patent. In his first report, after his discussion of nearly every

asserted claim, Dr. Grimshaw states, "I have reviewed the pertinent LogMeIn source code, which

confirms my opinions above." (*See, e.g.,* Ex. 1 (1/21/11 Expert Report of Dr. Grimshaw), ¶¶ 57,

63, 67, 71, 76, 106, 127, 132, 134, 146, 169, 176, 180, and 184.)[1] However, Dr. Grimshaw never identifies any specific portion (*e.g.*, by file or by line) of LogMeIn's source code that he relies on when making these statements, nor does he ever explain in any fashion how the (unidentified) source code confirms his opinions.

This failure to explain or disclose his analysis of LogMeIn's source code persists in Dr. Grimshaw's other reports. In his one-page supplemental report dated February 10, 2011, Dr. Grimshaw alleges that LogMeIn's IT Reach product also infringes the asserted claims. (*See* Ex. 2 (2/10/11 Supplemental Expert Report of Dr. Grimshaw), ¶ 2.) However, he makes this statement again without citation to or analysis of any specific portion of LogMeIn's source code. Instead, he says that he finds infringement "for the reasons set forth in [his] January 21, 2011 expert report." (*See id*.)

Similarly, in his February 28, 2011, rebuttal expert report he only mentions LogMeIn's source code once: he states that he has seen "communication channel data structures" in LogMeIn's source code. (*See* Ex. 3 (2/28/11 Rebuttal Expert Report of Dr. Grimshaw), p. 6.) As before, he does not explain where in LogMeIn's source code these structures may be found or how he concluded that LogMeIn's source code contains these structures.

Finally, in his supplemental report dated December 14, 2012, he states that the Gateway source code has changed through the addition of a "CDNSUpdater file," but he nevertheless concludes that the changes to LogMeIn's source code do "not affect [his] infringement analysis as provided in [his] prior reports." (*See* Ex. 4 (12/14/12 Supplemental Expert Report of Dr. Grimshaw), ¶ 4.) Again, although giving Bates numbers for LogMeIn's updated source code, he

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[1]   Herein, "Ex." refers to exhibits attached to the Declaration of Leslie Pearlson In Support of LogMeIn, Inc.'s Motion in Limine #5, attached hereto.

does not provide any additional information regarding the source code he purportedly reviewed

for his prior reports. (*See id*. ¶¶ 2, 4.)

III.   ARGUMENT

As this Court has held previously, "Federal Rule of Civil Procedure 26, which is

incorporated into Local Rule 26, provides that expert reports shall contain a complete statement

of all opinions to be expressed and the basis and reasons therefor[.]") *See Rambus, Inc. v.*

Infineon Techs. AG, 145 F. Supp. 2d 721, 724 (E.D. Va. 2001) (Payne, J.) (citation and internal

quotation marks omitted); *see also* Fed. R. Civ. P. 26(a)(2)(B)(i). Here, Dr. Grimshaw's reports

fail to comply with Fed. R. Civ. P. 26 because he fails to identify any specific portion of

LogMeIn's source code that he relies on in his infringement analysis. Further, he does not even

attempt to disclose how or explain why he believes the source code confirms his opinions. Thus,

for these two reasons, he has failed to disclose the basis for his opinions as required under the

Federal Rules. *See, e.g., Sharpe v. United States*, 230 F.R.D. 452, 458 (E.D. Va. 2005)

(Friedman, J.) (excluding testimony of plaintiff's medical experts because "the doctors do not set

forth what data or information that they relied upon in making these opinions"); *Elder v. Tanner*,

205 F.R.D. 190, 194 (E.D. Tex 2001) ("The reports of Plaintiff's experts are conclusory. They

state the experts' ultimate opinions regarding infringement . . . and, generally, the authorities and

evidence upon which they rely, but without any elaboration or reasoning. It is not sufficient

simply to list the resources they utilized and then state an ultimate opinion without some

discussion of their thought process."); *see also United States v. GC Quality Lubricants, Inc.*,

Civil Action No. 5:01-CV-323-3 (HL), 2002 WL 34376587 at *2 (M.D. Ga. Sept. 27, 2002)

("An expert report must contain some discussion of the reasoning and thought process that led to

the ultimate conclusion") (citations omitted); *Upsher-Smith Lab., Inc. v. Mylan Lab., Inc.*, 944 F.

Supp. 1411, 1440 (D. Minn. 1996) (excluding expert opinion in part because the expert's reports failed to disclose "the facts and rationale which underlie the opinions expressed").

When a party's expert has failed to disclose the basis and reasons for his or her opinions as required by Fed. R. Civ. P. 26, an appropriate remedy is the exclusion of the undisclosed matters at trial. *See* Fed. R. Civ. P. 37(c)(1). Courts have consistently applied this remedy to prevent unfair prejudice and to maintain an orderly progression of the litigation. *See Sharpe*, 230 F.R.D. at 458-59 (granting summary judgment in part because the reports of plaintiff's experts were not "sufficiently detailed and complete enough to enable adequate preparation by the defendant"); *see also Thomas v. Wash. Indus. Med. Ctr.*, No. 98-1652, 1999 WL 507150 at *8 (4th Cir. July 19, 1999) (affirming the district court's decision to bar expert testimony not previously disclosed in an expert report to avoid "unfair surprise" at trial).

Here, in light of the proximity to trial, the preclusion of Dr. Grimshaw's testimony regarding LogMeIn's source code is appropriate, if he is allowed to testify at all. If Dr. Grimshaw were now permitted to elaborate on or "supplement" his undisclosed citations to and reliance upon unidentified source code, LogMeIn would suffer severe and unfair prejudice because it would be the first time that these opinions were ever disclosed to LogMeIn.

IV.   CONCLUSION

For the foregoing reasons, if Dr. Grimshaw is permitted to testify on infringement at all, he should be precluded from offering any testimony about LogMeIn's source code.

Dated: February 22, 2013   Respectfully submitted,

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/S/

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